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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

No. 314

CLARENCE F. HUNT,
Appellant,
vs.
THE NEW YORK CUTTON EXCHANGE

Appeal from the Circuit Court of the United States for the Western District of Tennessee.

BRIEF AND ARGUMENT FOR APPELLEE.

HENRY S. ROBBINS,
For Appellee.

HENRY W. TAFT,
HENRY CRAFT,
Of Counsel.

SOUTHERN-TARBELL PRINTING CO., MEMPHIS.

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CLARENCE P. HUNT, *Appellant,* vs. THE NEW YORK COTTON EXCHANGE.	Appeal from the Circuit Court of the United States for the Western District of Tennessee.

STATEMENT.

This is an appeal directly to this court upon the ground that "jurisdiction of the [Circuit] court is in issue."

Appellant is the defendant in a chancery suit brought by the New York Cotton Exchange to further its efforts to confine its market quotations to persons using them for lawful purposes. In its material facts it is not distinguishable from *Board of Trade of the City of Chicago* v. *Christie Grain & Stock Company,* 198 U. S., 236.

Appellee in July 1903 adopted a plan for the re-

stricted distribution of its quotations, similar to that of the Chicago Board of Trade. "The telegraph companies all receive the quotations under a contract not to furnish them to any bucket shop or place where they are used as a basis for bets or illegal contracts. To that end they agree to submit applications to the" appellee "for investigation, and require the applicant, if satisfactory, to make a contract with the telegraph company and" appellee "which, if observed, confines the information within a circle of persons all contracting with" appellee.

The bill contained the usual jurisdictional averment that the amount involved exceeds $2,000. (Rec., 14.) Appellant filed a plea to the jurisdiction, alleging the contrary. (Rec., 21.)

The court heard evidence in open court upon the issue raised by a replication to this plea, and overruled the plea to the jurisdiction. (Rec., 23.)

Thereupon appellant answered and appellee filed its replication. These pleadings, among other things, disclosed that, at the time appellee made its present contracts with the telegraph companies providing for a restricted distribution of its quotations, appellant was receiving appellee's continuous quotations from the Western Union Telegraph Company under a contract with that company determinable at its will. (Rec., 30, 67, 68.) Upon being called upon by the telegraph company, after it had made its present contract with appellee, to sign the application for the quotations required by that contract, appellant, in a suit in a state court to which appellee was not made a

party, secured a temporary injunction restraining the telegraph company from withdrawing the quotations. This injunction was in force when the suit at bar was instituted.

The prayer of the bill at bar is that appellant be enjoined from receiving these quotations until he shall have complied with the requirements imposed by appellee's contracts with the telegraph companies.

Under this state of the pleadings appellant contended that the pendency of this state court suit was a legal obstacle to a decree for appellee by reason of section 720 of the Federal statutes, providing that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state," etc. The Circuit Court ignored this defense, treated the pendency of the state court suit as *res inter alios acta* and entered a final decree permanently enjoining appellant from receiving or using appellee's market quotations until he shall have "first lawfully acquired the right to receive said quotations, either by contract or purchase from complainant, or, with the complainant's consent and approval, from one of the telegraph companies authorized by complainant to distribute said quotations." (Rec., 88.)

Thereupon appellant, electing to come directly to this court on the question of jurisdiction alone instead of taking the whole case to the Circuit Court of Appeals for review, perfected the present appeal, and here assigns only two errors (Rec., 93). One is based upon the overruling of the plea to jurisdiction, and the other is as follows:

"Wherein it held thereafter, that upon the matters

and things set forth, by the plaintiff, it had jurisdiction to grant the injunction in this case, and to pronounce the final decree herein."

Under this assignment of error the learned counsel for appellant says:

"The only question upon this branch of the case is whether it comes within the provision of the Revised Statutes, Sec. 720, which is to the effect that no writ of injunction shall be granted by a court of the United States to stay proceedings of any court, except in matters of bankruptcy."

ARGUMENT.

I.

THE AMOUNT IN DISPUTE EXCEEDS $2,000, AND IT WAS NOT ERROR TO OVERRULE THE PLEA TO JURISDICTION.

Upon this issue the burden of proof was upon appellant. In

Sheppard v. *Graves*, 14 How., 504, 510,

this court said that:

"Although in the courts of the United States it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, yet wherever jurisdiction shall be averred in the pleadings, in conformity with the laws creating those courts, it must be taken *prima facie* as existing, and that it is incumbent on him who would impeach that jurisdiction for causes *dehors* the pleading, to allege and prove such causes: that the necessity for the allegation and the burden of sustaining it by proof, both rest upon the party taking the exception."

The rule thus prescribed has become the settled practice. In

Adams v. *Shirk*, 55 C. C. A., 25 (7th Cir.); 117 Fed., 801.

the jurisdictional question being one of citizenship instead of amount, the court said:

"The proper allegation of jurisdictional facts, *prima facie*, was true. * * * Under the plea in the present case, * * * the burden most assuredly was upon the moving party. Plaintiff in error introduced no evidence on the subject."

Pennsylvania Co. v. *Bay*, 138 Fed., 203.

There the sufficiency of the jurisdictional amount

was denied, but the defendant failed to put in any proof upon that issue. The Circuit Court said:

"The allegation of jurisdictional facts is *prima facie* true, and the burden of the affirmative averment in a plea in abatement of facts showing such want of jurisdiction is upon the party making such averment."

To the same effect are:

Wiemer v. *Louisville Water Co.*, 130 Fed., 244.
Butters v. *Carney*, 127 Fed., 622.

Not only is the burden upon the defendant to prove the amount involved to be less than $2,000, but he must prove it by a decided preponderance and to a legal certainty.

Wetmore v. *Rymer*, 169 U. S., 115.

There the lower court dismissed upon the ground that the amount involved did not exceed $2,000, but this court in reversing said that:

"A suit cannot be properly dismissed by a Circuit Court as not substantially involving a controversy within its jurisdiction, unless the facts when made to appear on the record, create a legal certainty of that conclusion."

Gage v. *Pumpelly*, 108 U. S., 164.

There, the question being whether the amount involved was sufficient to sustain an appeal, this court said:

"There is no such decided preponderance of the evidence in this case against jurisdiction as to make it our duty to dismiss the appeal," etc.

The next question is, what is the thing or subject-matter, whose value is to determine jurisdiction in the suit at bar.

When appellee made its present contract with the

telegraph companies, appellant was paying one of them $25 per month for the quotations, and his counsel contended upon the trial of the plea, and tried his case on the theory, that this furnished the measure of the value of the matter in controversy. The trial judge rejected this view and stated that it was the value of the contract between appellee and the telegraph companies. (Rec., 72.)

In suits which seek no money decree but the protection of a property or contract right by injunction or like relief, the jurisdictional test is the *value of the right* sought to be protected or enforced.

Miss., etc., R. R. Co. v. *Ward*, 2 Black., 485, where, in a suit to abate a nuisance, this court held that plaintiff need not show that his damage had amounted to the jurisdictional amount, but that the jurisdiction was to be tested by the value of the object sought by the bill, and that object was the removal of the nuisance.

Texas & P. Ry. Co. v. *Kuteman*, 4 C. C. A., 503 (5th Cir.), 54 Fed., 547.

There to a suit to enjoin a shipper from prosecuting sundry suits for overcharges in freight it was objected that the amount involved did not exceed $2,000, but the court in overruling this objection said:

"The amount in dispute is the value of the object to be gained by the bill. * * * The maintenance of its rates is the real subject of dispute, and the object of the bill, and the value of this object must be considered."

Whitman v. *Hubbell*, 30 Fed., 81.

There in a suit to restrain the maintenance in a street of an awning adjoining plaintiff's premises, it

was contended that the amount involved was not sufficient to sustain a removal. The court in overruling the objection, said:

"The matter in dispute is the value of the right to maintain the awning, not the amount of damage done by it to the plaintiff." In

Board of Trade v. *Cella Com. Co.* (C. C. A. 8th Cir.), 145 Fed., 28,

a suit similar to the one at bar, brought by the Chicago Board of Trade to enforce a similar restricted distribution of its quotations, the court, in deciding that the amount involved exceeded $2,000, said:

"In a suit to enjoin a threatened or continued commission of certain acts the amount or value involved is the value of the right which the complainant seeks to protect from invasion, or of the object to be gained by the bill. It is not the sum he might recover in an action at law for the damage already sustained, nor is he required to wait until it reaches the jurisdictional amount. * * *

In the case before us the Board of Trade claims a right of property in the market quotations gathered upon the floor of its exchange, and also the right to control their distribution and use. Upon the faith of the validity of these claims, it entered into a contract with two telegraph companies for the distribution of the quotations to those approved by it, which yields it an annual revenue of $30,000. The contract obligates the Board of Trade to use all reasonable endeavors to protect its property right in the quotations against purloiners thereof. The contentions of the defendants and their acts are wholly at variance with the existence of any such right of property or control. They assert, somewhat inconsistently, that the quotations are the result of gambling transactions, and therefore not the subject of property, and also that they are affected with a public interest, and the right to the general use by all desiring them cannot be prohibited or restrained by the Board of Trade. It is

obvious that, if the position of the defendants be sustained, the rights of the Board of Trade would either cease to exist or become of merely nominal value. The real value of the property claimed arises from the right of selection and exclusion of those desiring the use thereof, and to prescribe terms and conditions; and it is this property and the accompanying right, which, denied by the defendants but yielding the revenue above indicated, are sought to be protected by the bill of complaint. This is a sufficient showing of a jurisdictional amount or value in controversy."

Other cases applying the same principle are:

McNeill v. *Southern Ry. Co.*, 202 U. S., 558.

Hutchinson v. *Beckham*, 55 C. C. A., 333; 118 Fed., 399.

Butchers' etc., Co. v. *Louisville & N. R. Co.*, 14 C. C. A., 290; 67 Fed., 35.

Scott v. *Donald*, 165 U. S., 107.

Amelia Milling Co. v. *Tennessee Coal Co.*, 123 Fed., 811.

Humes v. *City*, 93 Fed., 857.

Nashville Ry. Co. v. *McConnell*, 82 Fed., 65.

Smith v. *Bivens*, 56 Fed., 352.

Lanning v. *Osborne*, 79 Fed., 657.

Nor is a party to be denied a right to resort to a federal court for the protection of his property, because the value of the right asserted is not capable of being *accurately* measured in dollars and cents.

In *Northern Pac. R. R. Co.* v. *Cunningham*, 103 Fed., 708, the question being whether the amount involved exceeded $2,000, the Circuit Court said:

"The complainant asks protection for more than 12,000 acres of grazing lands from further injury by a continuing trespass. The evidence does not enable me to fix precisely the value of the right which is the

subject of controversy, but the amount of damage which has been done certainly is not the measure of value. * * * Considering the number of acres involved, I am satisfied that the value of the protection which the complainant asks for is more than $2,000; and it is not necessary, in order to sustain the jurisdiction of the court, for the complainant to show the amount in controversy with any greater accuracy."

In *Butters* v. *Carney,* 127 Fed., 622, upon the question of the jurisdictional amount the court said:

"So far as relates to the plea, it is not the value of the defendant's claim that constitutes the amount in controversy, but it is the value of the whole property which plaintiff claims, as described in his complaint. * * * The value of the property, as shown by all the testimony, is somewhat of a speculative character, depending to a great extent upon the use to be made of it, and, so far as the millsite is concerned, the opportunities or certainty of obtaining ore and a supply of water. The burden of proof to sustain the plea is cast upon the defendant, and he has not established it by a preponderance of the evidence by proofs such as the law requires in cases of this character."

See, also,

Sparrow v. *Strong,* 3 Wall., 97, 103.

Speaking generally, this suit relates to *property.* Appellee contends that its quotations and the right to control, by the restrictions here disclosed, their distribution, constitute property. It costs appellee $4,500 yearly to assemble and furnish the quotations to telegraph companies, and from their sale through the contracts shown in this record, appellee realizes $16,980 per year. (Rec., 59.)

If property, the quotations and the right to control their distribution constitute property of a peculiar character. As appellant did not file an answer in support of his plea, every allegation of the bill pertinent to

the issues on the plea is, in deciding the plea, to be taken as true. Of such are the following:

"That said quotations are of such a peculiar kind of property that their value depends on your orator's power to confine the transmission and distribution thereof to such telegraph companies and other distributing agencies as will contract therefor with your orator, and that if any person or corporation is permitted to promptly acquire said quotations surreptitiously or by theft, or without paying your orator therefor, such person or corporation can promptly give the same to numerous other persons throughout the United States and the telegraph companies contracting with your orator for said quotations would thus be put to a disadvantage in competition with such persons so obtaining the said quotations without paying your orator therefor." (Rec., 3.)

"And that if even one person within the jurisdiction of this Court be allowed to secure such quotations without the restrictions as to the use thereof which your orator imposes as aforesaid, such person can furnish them to all the bucket shops and other persons within the United States desiring them, and thus entirely defeat the efforts of your orator to prevent their use in bucket shops as a basis of their illegal bets." (Rec., 14.)

A right of property in a thing, especially in such a thing as this market news, includes the exclusive right to use it, to sell, or not to sell, it to others, and to determine at what price a sale shall be made, *and to whom it shall be sold,* or, as it is sometimes expressed, the "right of selection and exclusion." Such is the nature and extent of the right in its quotations which appellee asserts in this suit.

It would seem true also that, subject to the right of the court under section 5 of Act of March 3, 1887, to protect itself against all improper or collusive at-

tempts of litigants to impose upon its jurisdiction, the nature and extent of the right of property sought to be protected or enforced, must be determined from the bill alone, and without reference to admissions subsequently made by the defendant seeking or tending to minimize the extent of the right in dispute. But this becomes an immaterial inquiry here because the right asserted in the bill is to its full extent denied by appellant's answer.

It avers:

"This defendant denies therefore, that the plaintiff has any property in any quotations of prices, it sells and delivers to any telegraph company to be transmitted after the same are delivered. * * * The plaintiff has not capacity or power to own any such quotations upon their arrival in the State of Tennessee, or after their delivery here." (Rec., 26.)

Respecting the contract through which appellee derives its revenue from these quotations and seeks to enforce this restricted distribution thereof, the answer avers (Rec., 27):

"He denies that the rights he possessed when the said contract was entered into * * * were, or could be affected by any such contract, and he claims and insists as to him and his right, the said contract was wholly without effect or force. * * * It is also illegal and void in attempting and undertaking to create and preserve a monopoly in the plaintiff as to the sale and use to be made of the quotations after they have reached the State of Tennessee and in undertaking to confine the sale and distribution of such quotations to such persons as the plaintiff arbitrarily elect shall be allowed to purchase, or receive the same, and to exclude without reason and on no sufficient ground all persons objectionable to the plaintiff willing to pay therefor and desiring to obtain

such quotations,—from purchasing or acquiring or using the same.

The said contract is illegal and void because it provides that the Telegraph Company shall not furnish quotations to any person whomsoever until such person shall have submitted an application in writing to the plaintiff in a form prescribed by it, nor until the plaintiff had approved the application," etc.

Again, the answer insists that after allowing the quotations to be distributed for many years, they have become "*quasi* public property," and impressed with a public use so that appellee could not withhold the quotations from the public generally, as by the contract it seeks to do. (Rec., 28.)

The answer further insists (Rec., 29) that the form of application prescribed by appellee to be signed by those desiring the quotations is "unreasonable and oppressive" and "contrived and intended to create and perpetuate in plaintiff a monopoly in the said quotations." (Rec., 29.)

Thus appellant in effect disputes all the rights claimed by appellee in these quotations. Hence, the matter in dispute is this property right claimed by appellee in its quotations. The pecuniary value of this right, therefore, may well be determined by considering what effect a decision on these claims against appellee would have (1) upon the salable value to appellee of these quotations, and (2) upon appellee's right of selection and exclusion.

On the first question it is incumbent upon appellant, having the burden of proof, to establish by a "decided preponderance of the evidence" that this salable value of these quotations would not,

by a decision against appellee, be impaired more than $2,000. Upon this question the fact that the telegraph companies are now under contract to pay a certain price per year for the quotations would not materially help appellant, because these contracts are determinable at the end of any year. (Rec., 60, 61.) Under those contracts all recipients of quotations are inhibited from re-distributing them except (under certain restrictions) to their own agents and correspondents. (Rec., 12.) It should not be presumed that upon a decision against this right of appellee to thus confine the quotations the telegraph companies would, after the expiration of the current year, continue to pay so large a price for them. In the absence of any clear evidence to the contrary it should be assumed that a decision against this property right claimed by appellee in quotations, from whose sale a yearly revenue of $16,980 is derived, would impair its pecuniary value more than $2,000.

Aside from its effect on this salable value of the quotations, it is clear that a decision against appellee would put an end to its right of selection and exclusion.

The second question, then, is, what is the value of this right? As this right to thus select and exclude is obtained by appellee through its contracts with these telegraph companies, it is perhaps accurate enough to say that the amount here involved is the value to appellee of these contracts.

Upon neither of these questions did appellant introduce any evidence—at least any direct evidence—to show what was the value of the right appellee seeks to

protect by this suit. He neither attempted to prove that the salable value of the quotations would not, by a decision against appellee, be impaired to the extent of $2,000, nor what was the value of its right of selection and exclusion in this distribution. In fact, he did not try the issue raised by the plea upon the theory that the test of jurisdiction was the value of appellee's right in these quotations. On the contrary, he introduced in evidence his contract with one of these telegraph companies, wherein he was to pay $25 per month for the quotations, and contended that this showed " the matter in controversy," and "that it is just worth $25." (Rec., 68.)

He did introduce the present contracts between appellee and the two distributing telegraph companies, but these, instead of sustaining him upon the issue, were—at least in the absence of other evidence—sufficient to show that the amount involved exceeded $2,000. This was expressly so decided in *Board of Trade* v. *Cella Commission Company,* already cited, and in *Board of Trade* v. *Thomson Com. Co.,* 103 Fed., 902, where Judge Seaman held that upon the face of the Chicago Board of Trade contract the amount involved exceeded the jurisdictional requirement. These two cases are not distinguishable from the case at bar. Under its contract the Chicago Board of Trade was obligated to use all reasonable efforts to protect its property right, while appellee by its contract is not. But this does not seem to be a material distinction in view of the fact that both contracts were of such short duration, each being terminable at the expiration of a year. Nor is there a distinc-

tion in the fact that the revenue derived by the Board of Trade under its contract ($30,000) exceeds somewhat that derived by appellee under its contract ($16,980).

Appellant also introduced two earlier contracts between appellee and the Western Union Telegraph Company. One of these (Rec., 48) is dated February 18, 1903, and provided for the same restricted distribution of the quotations as do the present contracts. The yearly revenue from the quotations was fixed at $10,000, as against $13,584 in appellee's present contract with the same company. This difference is due to the fact that the expense of gathering the quotations was in the contract of February 18, 1903, placed upon the telegraph company, while in the contract now in force it is assumed by appellee.

The other was a contract between appellee and the same telegraph company, dated March 18, 1884, and in force up to February 18, 1903. (Rec., 42.) This contract does not impose any restrictions upon the distribution of the quotations or otherwise safeguard the property right therein, and in this respect it differs from the contract of February 18, 1903, and the present contracts. Under this first contract the price paid to appellee by the telegraph company (up to February 1st, 1903), was $2,500 per annum. Hence, this contract does not sustain appellant's contention. On the contrary the conclusion deducible from it and the subsequent contracts is that the Western Union Telegraph Company is willing to pay $7,500 a year more for the quotations under a contract which safeguards appellee's property right therein and re-

stricts distribution thereof, than under a contract which does not do so.

Appellant introduced no other evidence tending to show the amount involved, and thus clearly failed to sustain the burden cast upon him to establish the truth of the plea by such decided preponderance of the evidence as the law requires.

On behalf of appellee two witnesses testified as experts as to the value of its right of selection and exclusion in the distribution of quotations. One of these, John Hill, a member of the Chicago Board of Trade who had charge of its protracted campaign against bucket-shops, including the extensive litigation which resulted in the decision of this court in *Board of Trade* v. *Christie Company, supra,* testified that in his opinion appellee's right to confine its quotations as provided in its contract was worth "a great many thousands of dollars." (Rec., 79, 80.) The other witness, Mr. King, appellee's superintendent, testified that in his opinion the value to appellee of this right very much exceeded $2,000.

Again, appellant testified that his business is that of accepting speculative trades and that his contracts for the future delivery of cotton amount to at least half a million bales a year, and that they are of a character to be placed upon appellee's exchange through its members. (Rec., 75, 76.) If all this business were carried to appellee's exchange the commissions for executing it would be $75,000. (See p. 97 of Rules of Exchange, forming part of the record.) Appellant's answer also admits that its failure to get these quotations "would in effect destroy

his business as a business of profit and value." If the use of these quotations is of such value to one person, is it not apparent that the right to confine their use throughout the United States to such persons as will contribute business to, or at least not divert business from, appellee's exchange, must be of immense pecuniary value to appellee and its members?

The foregoing constitutes all the evidence introduced by either party on the question of the value of the right sought to be enforced or protected by this suit. It is submitted that it amply justified the trial court in finding against appellant on his plea to the jurisdiction.

II.

THE SECOND ASSIGNMENT OF ERROR DOES NOT RAISE A QUESTION OF JURISDICTION, AND HENCE DOES NOT PRESENT A QUESTION FOR DECISION UPON THIS APPEAL.

Upon an appeal like the present one, the Act of 1891 provides that "the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

Judgment having been rendered on the merits in favor of appellee, appellant had his election to (1) have the question of jurisdiction certified directly to this court, or (2) carry the whole case to the Circuit Court of Appeals. Having chosen the former course, the only question here is whether the trial court had jurisdiction.

McLish v. *Roff*, 141 U. S., 661, 668.
United States v. *Jahn*, 155 U. S., 109, 114.

The inquiry then is, whether this second question—

the pendency of a prior suit between appellant and the telegraph company in the state court—constitutes a question of jurisdiction within this statute.

"Jurisdiction" is a word of different meanings. In its more restricted and accurate sense it means "power to decide." Without this any judgment is subject to direct or collateral attack as an absolute nullity. Jurisdiction of this kind is two-fold: (1) of the subject-matter, and (2) of the person. If either is wanting, there is no jurisdiction.

Hence this court has uniformly upheld its jurisdiction to review, upon direct appeal or writ of error under section 5 of the Act of 1891, any such question of jurisdiction,—whether of the subject-matter or of the person of the defendant. The question here first discussed is one of jurisdiction in this sense.

In a looser sense a court of equity is said to have no "jurisdiction" where there is a remedy at law. But as, under the Federal judicial system, the same court has jurisdiction of equity and common law cases, this objection really is, not that the court, as such, has no jurisdiction at all, but that the suit is on the wrong side of the court.

So a court is said to be without jurisdiction, where another court has previously acquired jurisdiction.

But in both these cases the court is required to decide whether, in the one case, the remedy at law is adequate, and in the other, which court did first get jurisdiction, and its decision binds the parties. Hence it has power to decide, and it cannot be said with accuracy that the court is without jurisdiction.

In the case at bar the defense appellant is seeking to make is that of a prior suit pending in the state court, as will appear from the following extract from his answer (Rec., 34):

"This defendant states and shows that the said suit, so pending in the Chancery Court of Shelby County, embraces and comprehends the same subject-matter as this present suit, that it is between the same parties, plaintiffs and defendants as this present suit; that the same questions of fact and law are involved and to be decided as in this suit, and that the decree to be pronounced will adjudicate and dispose of the same matters of controversy that are sought to be adjudicated and disposed of in this suit."

This is followed by a claim that the Circuit Court had no jurisdiction to grant or issue the injunction herein prayed for.

To sustain this defense appellant relies on Section 720 of the Revised Statutes, which reads as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

And appellant in his brief says (italics ours):

"The second assignment of error involves the determination of the question of whether, upon the facts and circumstances of this case, the Circuit Court of the United States *in equity,* had jurisdiction to grant the injunction herein."

But the question thus presented is only whether the pendency of the prior state court suit is a bar to relief in the suit at bar and this, as respects jurisdiction, is not different in its nature from

the question whether in a suit in chancery the remedy is not at law. In both cases this court has several times decided that the question thus raised was not one of jurisdiction within the act of 1891.

Thus the objection that the remedy is at law does not present a question of jurisdiction.

Smith v. *McKay,* 161 U. S., 355.
Blythe v. *Hinckley,* 173 U. S., 501, 507.

Nor does the objection that the court cannot grant the relief sought because of prior state court litigation pending, or constituting *res adjudicata.*

Blythe v. *Hinckley,* 173 U. S., 501, 507.
Huntington v. *Laidley,* 176 U. S., 668, 679.
Louisville Trust Co. v. *Knott,* 191 U. S., 225.
Bache v. *Hunt,* 193 U. S., 523.

In *Huntington* v. *Laidley,* this court said:

"Under the circumstances of this case, the question whether the proceedings in any or all of the suits, at law or in equity in the state court, afforded a defense—either by way of *res adjudicata,* or because of any control acquired by the state court over the subject-matter—to this bill in the Circuit Court of the United States, was not a question affecting the jurisdiction of that court, but was a question affecting the merits of the cause, and as such to be tried and determined by that court in the exercise of its jurisdiction."

It is difficult to see any distinction between these cases and the one at bar. If the question in those cases—which of two courts, one state and one federal, had first acquired such jurisdiction or control of a case as will entitle it to appoint a receiver,—is an objection, not of the want of power, but of the want of equity in the complainant's bill, so is the ques-

tion in the case at bar—whether appellant should not be enjoined from receiving property, although he is seeking to obtain it through a suit brought by him against a third party in a state court. No distinction can be predicated upon the fact that in the former cases the principle applicable arises out of the general law and in the case at bar it is declared by statute.

That statute is not, and does not profess to be, one defining jurisdiction of federal courts, but is only a part of the large body of statutory law enacted by Congress to control those courts in the decision of their cases. The question whether this statute applies to a particular case must be raised by pleadings and evidence. Appellant felt it incumbent upon him to offer in evidence a record of the state court case. (Rec., 68.) It became then the duty of the Circuit Court, to decide whether the statute applied to such a case as the one at bar. This was the exercise of jurisdiction, for, as this court said in

Ill. Cen. R. R. Co. v. *Adams*, 180 U. S., 34:

"Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence."

The second question presented by appellant's brief was, therefore, not a question of jurisdiction and does not arise upon this appeal.

This will become more obvious by considering the nature and merits of this second question.

In the first place it is settled by abundant decisions that the prior pendency of a suit (not involving the court's possession of the *res*) in one jurisdiction is no

bar to a like suit, even between the same parties, in another jurisdiction, and that within this rule a state court and a federal court (even within that state) are courts of different jurisdictions.

Gordon v. *Gilfoil,* 99 U. S., 168.
Stanton v. *Embrey,* 93 U. S., 548.
Insurance Co. v. *Brune's Assignee,* 96 U. S., 588.
Merritt v. *American Barge Co.,* 24 C. C. A., 530; 79 Fed., 228.
Shaw v. *Lyman,* 79 Fed., 2.
Defiance Water Co. v. *City,* 100 Fed., 178.
Marshall v. *Otto,* 59 Fed., 249.
Hurst v. *Everett,* 21 Fed., 218.

In *Gordon* v. *Gilfoil, supra,* a plea was interposed that the court was "without jurisdiction" because of the pendency of a prior suit in the state court, but this court held the objection to jurisdiction was "destitute of foundation," and said (italics ours):

"What effect the bringing of this suit, *via ordinaria* may have had on the order of seizure and sale [state court suit], it is not necessary to determine. It is possible that it superseded it. But the pendency of that proceeding, when the suit was commenced, cannot affect the validity of the proceedings in this suit, nor *the jurisdiction of the court in respect thereof.*"

A fortiori, a suit in the federal court, such as the one at bar, brought by one who is *not a party* to a prior state court suit, and against whom a judgment of the state court would therefore not be *res adjudicata,* cannot be defeated by the pendency of the state court suit.

The result of these cases is that each suit is entitled to proceed in the usual order to a decree. Nor can the state court defeat this constitutional right of a party to sue in the federal court by issuing a temporary injunction, which ordinarily only aims to preserve the *status* in that case until the final hearing.

Nor is this situation changed by the possibility that the federal court decree may conflict with that thereafter entered in the state court suit. Such inconsistency should not be presumed. On the contrary, as the courts are enforcing the same law, the presumption should be that both decrees would conform to the law and thus be the same.

Nor can it be said that, because the final decree of the federal court enjoins the receipt and use of the same property which the defendant in the federal court suit is, as plaintiff in the state court, seeking to get from a third party (or even the plaintiff in the federal court suit), the latter court is thereby granting an injunction "to stay proceedings in any court of the state" within the meaning of section 720. Such is not the meaning of that section. It is not aimed at inconsistent decrees; nor does it seek to paralyze action in the regular course by federal courts. The decree in the case at bar does not enjoin the state court nor appellant from proceeding there. This is made clear by the opinion of the Circuit Court in the case at bar (144 Fed., 511), and the following cases:

Bank of Kentucky v. *Stone,* 88 Fed., 383.

In that case a bank filed a bill against the State Auditor, State Treasurer, and Secretary of State, to

restrain the assessment and collection of certain taxes for the City of Louisville, and the answer insisted that a *mandamus* proceeding in the state court by the City of Frankfort was commenced before the action in the federal court and was still pending, and that a preliminary injunction by the federal court would be "in effect an injunction against that proceeding in the state court," but the Circuit Court of Appeals, speaking through Judge Taft (Mr. Justice Harlan concurring), said:

"It is settled that the pendency of a suit in a state court is no bar to a suit upon the same subject-matter in this court. * * * The injunction which we shall grant may be offered as a defense by the board of valuation and assessment in the court where the mandamus proceeding is pending, just as a judgment rendered in one of two pending suits for the same cause of action may be offered by supplemental pleading in the other. The sufficiency of the defense will be for that court. We do not enjoin any suit at all by our order; all we do enjoin is the certification of the taxes. That does not require the defendants to disobey an order of any other court, or restrain their prosecution of a suit therein."

So the decree at bar does not require appellant to disobey an order of the state court, nor restrain his prosecution of the state court suit. True, a judgment now in the state court suit would not be of benefit to appellant for two reasons: first, because it would be, as respects appellee, *res inter alios acta;* and, second, because in the regular course of proceeding a final decree has been entered in one of two concurrent suits. But this latter is always the result to one party or the other in concurrent suits in two jurisdictions.

Woodbury v. *Allegheny Ry. Co.*, 72 Fed., 371.

There a trustee in a railroad mortgage commenced a suit in a state court to foreclose a mortgage. The defendant railroad company in another suit in the same court obtained an injunction restraining such trustee from proceeding with the foreclosure. The bondholders then requested this trustee to proceed to foreclose in another jurisdiction, and, upon its refusal, they filed a bill in the federal court for the foreclosure of the same mortgage, and the court held that the state court suit and the injunction therein did not deprive the federal court of the power to proceed to a decree for foreclosure of the property of the railroad in both jurisdictions, the court saying:

"That the mere filing of a bill to foreclose in the New York state court did not oust the jurisdiction of the circuit court for the Western District of Pennsylvania is clear. * * * While the New York court enjoined the trustee from bringing all suits upon the matters involved in the suit before it, and the trustee prudently obeyed the order, yet the mere pendency of that suit, or the subsequent restraining order upon the trustee, did not, in the absence of a final decree by that court, oust the jurisdiction of the United States circuit court of the Western District of Pennsylvania, or prevent it from entertaining a suit and determining all questions properly brought before it, although the same questions might be involved in the suit pending and undetermined in the first-named court."

That case is like the case at bar in that in each an injunctional order of the state court was issued, not against the plaintiff in the federal court, but against a third person.

The foregoing amply demonstrates that this second

question is not a question of jurisdiction, but that, if it were, it was correctly decided by the lower court.

It is therefore respectfully submitted that the decree of the Circuit Court should be affirmed.

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